

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK L. WALTON,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 193987

Recorder's Court

LC No. 95-011414

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

MEMORANDUM.

In a bench trial, defendant was convicted of carrying a pistol in a motor vehicle, MCL 750.227; MSA 28.424. This appeal of right is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that he was deprived of the effective assistance of counsel at trial because counsel presented a defense witness whom the trial judge, as trier of fact, concluded provided crucial evidence necessary to convict defendant of the crime charged. The two police officers who arrested defendant testified that, when the motor vehicle in which he was riding was stopped, the pistol was in his hand. The defense witness, Tamika Pope, testified that the contrary was the case, and the trial court found her testimony credible and concluded that the police officers were lying. However, Ms. Pope also testified that defendant made an incriminating admission to her, and it was this admission which the trier of fact found crucial in establishing defendant's guilt.

Defendant's trial counsel had only two available options, either to call Ms. Pope as a witness or not call her as a witness. Without her testimony, the only contradiction of the police officers' testimony would have been defendant's testimony, which the trial court also found not credible. But for Ms. Pope's testimony, there is no way of knowing whether the trier of fact would have found the police officers to be perjurers. Calling the witness under these circumstances, the only witness who proves to be credible, cannot be deemed ineffective assistance of counsel, *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Nor can counsel have been ineffective for failing to ask that Ms. Pope perjure herself when questioned about her subsequent conversation with defendant. *Id.*, 217.

* Circuit judge, sitting on the Court of Appeals by assignment.

Affirmed.

/s/ Gary R. McDonald

/s/ Myron H. Wahls

/s/ John R. Weber